In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE CHICAGO, MILWAUKEE AND ST. PAUL Railway Company, appellant, *v.* THE UNITED STATES. } No. 198.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On July 19, 1900, the appellant, a railway corporation organized and existing under the laws of the State of Wisconsin, filed its amended petition in the Court of Claims, alleging that there is due the petitioner from the United States the sum of $9,101.08, unpaid remainder for services performed in carrying the United States mails over postal route No. 139016. The averments in the petition may be summarized as follows:

That the Milwaukee and Northern Railroad Company on and prior to the 4th day of February, 1890, owned and operated the line of railroad from Milwaukee, Wis., to Republic, in the State of Michigan, a distance of 255.37 miles.

That on said 4th day of February, 1890, said line of road was extended and put in operation from Republic to Champion, Mich., a distance of 8.89 miles, making a total mileage of 264.26 miles.

That said line of railroad so owned by the Milwaukee and Northern Railroad Company had, prior to said 4th day of February, 1890, been designated by the postal authorities of the United States as route No. 139016, and had been authorized by the Post-Office Department to carry United States mail thereon, at such compensation as was or might be authorized by law and the practice of the Post-Office Department.

That on said 4th day of February, 1890, the Postmaster-General established and extended the railway mail service over that portion of the extended road from Republic to Champion, Mich., a distance of 8.89 miles.

That subsequently the postal authorities caused the United States mails on said route from Milwaukee to Champion to be weighed, as required by law, for thirty successive working days, giving the following notice thereof:

> The general superintendent railway mail service has been directed to weigh the mails on your road, route No. 139016, between Milwaukee and Champion, Mich., for thirty successive days, commencing September 23, 1890, for the purpose of obtaining *data* upon which to adjust the pay in accordance with the acts of Congress governing the same, from February 24, 1890, on extension from Republic to Champion.

and thereupon ordered that the compensation for the transportation of mails on said route be fixed from September 23, 1890, to June 30, 1891, at the rate of $35,022.37 per annum, the same being $132.53 per mile for 264.26 miles; and that from February 24 to September 22, 1890, compensation should be allowed at the rate of $1,178.19 per annum, being $132.53 per mile for the 8.89 miles' extension from Republic to Champion, Mich. (Record, pp. 2–4), the order fixing said compensation being of date December 1, 1890. (Record, p. 3.)

That on December 3, 1890, the Postmaster-General further adjusted the compensation for carrying said mails, as shown by the order of December 3, 1890, which provided that the compensation should be $1,178.19 per annum, the same being $132.53 per mile for the 8.89 miles' extension. (Record, p. 4.)

That in pursuance of the order of December 1, 1890, the Milwaukee and Northern Company entered upon the work of carrying the mails on said route between Milwaukee and Champion, and performed the services required by the order of December 1, 1890.

That the United States, instead of paying said railroad company the full amount of money to which it was entitled for the services rendered as aforesaid, only paid it at the rate of compensation fixed by said order, to wit, $132.53 per mile for 8.89 miles, being the extension from Republic to Champion only, and refused to pay it any sum beyond the sum of

$86.35 per mile for the mileage between Milwauke and Republic, leaving a balance due and unpaid $9,101.08.

That after said services had been performed and th full amount earned as fixed by the order of Decembe 1, 1890, payment of said amount of $9,101.08 wa refused, and the Milwaukee and Northern Railroa Company presented a claim to the Post-Office Depar ment for the payment of the same, which claim wa rejected for reasons set forth in paragraph 5 of th petition, the Post-Office Department contending tha the order of December 3, 1890, was a correction of th order of December 1, 1890, which said last-mentione order fixed the rate for the entire distance betwee Milwaukee and Champion at $132.53 per mile. (Re ord, p. 6.)

The petition further alleges—

> That on the 30th day of September, 1890, became the purchaser, and thereupon it becam the lawful owner by assignment and transfe of all of the capital stock of the said Milwauke and Northern Railroad Company; that on th 1st day of October, 1890, the board of direc ors of the Milwaukee and Northern Railroa Company was reorganized by the election persons who were either directors or officers the petitioner, and the offices were filled by th election of persons who were officers of its com pany, with the solitary exception of the presider of the Milwaukee and Northern Railroad Com pany; that from the 30th day of Septembe 1890, until the 26th day of June, 1893, tha

company operated the railroad as a separate organization and in the name of the Milwaukee and Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee and Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee and Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use, or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee and Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort. Your petitioner avers that by reason of the premises it has been the owner of the claim in suit ever since June 26, 1893, and is now the owner of the foregoing claim, no part thereof having been assigned or transferred by the petitioner in any way, and that it is entitled to receive payment thereof.

To the amended petition so filed the United States interposed its demurrer upon two grounds:

First. Because it appears that the claim therein presented has come to the claimant, if at all, by pretended assignment, which as to the United States is void.

Second. Because the allegations set forth in said amended petition do not state facts sufficient to constitute a cause of action in favor of the claimant and against the United States.

The demurrer was sustained by the Court of Claims and it was ordered that the amended petition be dismissed. From this judgment of dismissal the railway company appeals to this court.

ARGUMENT.

THE ASSIGNMENT OF THE CLAIM.

The first ground of the demurrer in this action is that the assignment to the claimant by which it asserts ownership of the claim, which is the basis of this action, is void under section 3477 of the Revised Statutes of the United States, which reads as follows:

> SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof * * *

As alleged in claimant's petition, and as stated in the brief for the appellant, the claimant became the

owner of the claim of the Milwaukee and Northern Railroad Company against the United States for carrying Government mails, through a deed from the former to the claimant by which that corporation conveyed to the claimant all its property of every kind, both real and personal, including this claim. This was a purely voluntary transaction, having reference only to the interests of the parties concerned, and hence the claim in question passed to the claimant by voluntary assignment. There seems to be no escape, therefore, from the conclusion that such assignment is controlled by the statute above cited, and hence is void.

This court has, on different occasions, passed upon that statute, and has done so in unmistakable terms and without any hesitation as to its meaning.

In the case of *Spofford* v. *Kirk* (97 U. S., 488), Mr. Justice Strong, speaking for the court, said:

> The act of Congress approved February 26, 1853 (10 Stat., 170), entitled "An act to prevent frauds upon the Treasury of the United States," reenacted in section 3477 of the Revised Statutes, declares that all transfers and assignments thereafter made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses after the

> allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.

In the case of *St. Paul and Duluth Railroad Company* v. *The United States* (112 U. S., 733), the Lake Superior and Mississippi Railroad Company entered into a contract to carry the mails at an agreed compensation, which was subsequently reduced at various times by the Postmaster-General. The Lake Superior road mortgaged all its property to trustees to secure its bonds, and the mortgage conveyed all property belonging to the company, which is particularly specified on page 735 of the report cited. The St. Paul and Duluth Company, on the foreclosure of the mortgage, became the purchaser of all the mortgaged property under the judicial sale, by virtue of a decree of court foreclosing the mortgage. The reduction of the Postmaster-General amounted to over $12,000, something over $3,000 of which had been earned by the contractor, the Lake Superior and Mississippi Railroad Company, and the remainder by the appellant. The St. Paul and Duluth Company brought suit for the total amount

of the reduction. The mortgage included all franchises connected with the mortgagor's railway, all corporate franchises of any nature, all endowments, income, advantages, etc. It was held that under the purchase of the property in the mortgage at judicial sale by the St. Paul Company it did not become the assignee of the contract between the United States and the Lake Superior Company, and that it could therefore claim nothing as such in the suit. It was further held: "That part of its claim for services rendered prior to the sale by the Lake Superior and Mississippi River Railroad Company falls within the prohibition of Revised Statutes, 3477."

If by reason of this prohibition of section 3477 all the property of the Lake Superior Company mortgaged by it and bought at judicial sale by the St. Paul Company did not include the claim for carrying the mails, how can it be contended in the case at bar that by virtue of the purchase by appellant of all the property of the Milwaukee and Northern Railroad Company it thereby became the owner of the claim sued upon? In the case cited it was held:

> It is a voluntary transfer, by way of mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale.
>
> If the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition.
>
> So the transfer, by the same proceeding, of the contract itself, so as to entitle the assignee to per-

form the service and claim the compensation stipulated for, is forbidden by section 3737, Revised Statutes, which provides that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

The explicit provisions of this statute do not require any comment. No explanation could make it plainer.

(See case cited, pages 736–737.)

In commenting upon the foregoing case in *Price* v. *Forrest* (173 U. S., 422), Mr. Justice Harlan, speaking for the court, said:

> Nothing more was adjudged in that case (*St. Paul and Duluth Railroad Company* v. *United States*, 112 U. S., 733) than that a voluntary transfer by way of mortgage of a claim against the United States for the security of a debt, and finally completed and made absolute by a judicial sale, was within the purview of the prohibition contained in section 3477 and could not be made the basis of an action against the Government in the Court of Claims. Such a voluntary assignment to secure a specific debt was held to be within the mischiefs which that section was intended to remedy. To the same class belongs *Ball* v. *Halsell* (161 U. S., 72), which was the case of a voluntary transfer of part of a claim against the United States on account of the depredations of certain Indians on the property of the claimant.

The only exception which this court has made from the operation of the statute is in cases where the assignment is "by operation of law."—Assignments defined in *The United States* v. *Gillis* (95 U. S., p. 416), as "devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law." The instances of assignment by operation of law, which this court has held not to be within the statute, are cases where the assignment has been made in bankruptcy or insolvency, or to a receiver appointed by the court. (*Irwin* v. *United States*, 97 U. S., 392; *Butler* v. *Goreley*, 146 U. S., 303; *Price* v. *Forrest*, 173 U. S., 410.) In every such case the assignment was involuntary. The only instance in which there has been any voluntary act on the part of the assignor, in which the court has held the assignment to be valid, is that of a voluntary assignment for the benefit of creditors. As to such an assignment it was pointed out that there was no difference between it and an assignment in bankruptcy, in the following language:

> In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the Government, differ from the assignment which is made in bankruptcy? (*Goodman* v. *Niblack*, 102 U. S., 560.)

It seems too clear for argument that the assignment of the claim which is the subject of this action does not, in any sense, come within the exceptions above

enumerated which are the only exceptions that have been announced by this court.

It seems equally clear also that there is a radical and essential difference between such excepted assignments and the assignment of the claim of the appellant. In every case where the assignment comes within the class defined by this court to be by operation of law, the transfer of the claim is and must be made in absolute conformity with the law governing the transaction, and the claim passes into the possession and ownership of an officer of the court—a trustee in bankruptcy, an assignee in insolvency, or a receiver of the court, and thereafter is subject to the control of the court with a status clearly defined by the statute under which the transfer is made. And this is equally true even where the transfer is initiated upon the involuntary petition of the assignor. But in the present case the assignment was as voluntary in every respect as the sale and transfer in any other case of a purchase and sale of property between private parties. Nor is this voluntary character of the assignment modified in the slightest degree by the fact that, as asserted by the appellent, it was made pursuant to a statute of Wisconsin authorizing the claimant, as a railroad corporation, to acquire by purchase all of the property of another railroad corporation. The only relation that such a statute bears to the transaction is that it renders it legal, but it gives it no other sanction, and certainly can not operate to relieve the claimant in any degree from the operation of a Federal statute relating to

assignments of claims against the United States. In other words, a statute which made it legal for the claimant to purchase all the property of another corporation and take a conveyance thereof, can not possibly have the effect to legalize an assignment or transfer by such conveyance of a claim against the United States in derogation of a statute of the United States which says that such an assignment is void.

The question may be summed up as follows:

By the decisions of this court only assignments "by operation of law" are excepted from the prohibition of section 3477. By the same decisions an essential element of an assignment by operation of law is that it must be involuntary, being in effect by compulsion of law. The assignment relied on by the appellant is in no sense involuntary, and it therefore falls within the prohibition of the statute.

THE MERITS.

THE AMENDED PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As shown by the statement, the order of December 1 fixed the compensation for carrying the mails for the whole distance between Milwaukee, Wis., and Champion, Mich., including the extended portion of the road. If this order were to stand, it would revoke and render null and void the compensation allowed by a previous order for carrying the mails between Milwaukee and Republic; but the postal authorities immediately discovered the mistake in the order of December 1, by which order they undoubtedly

intended to fix the compensation from Republic to Champion only. This conclusively appears in the order for the weighing of the mails, recited in the petition, wherein it is expressly stated that—

> The General Superintendent Railway Mail Service has been directed to weigh the mails on your road, route No. 139016, between Milwaukee and Champion, Michigan, for thirty successive days, commencing September 23d, 1890, for the purpose of obtaining *data* upon which to adjust the pay in accordance with the acts of Congress governing the same, from February 24, 1890, *on extension from Republic to Champion.* (Record, p. 5.)

Upon this discovery, two days after the order of December 1, they issued the order of December 3 (Record, p. 4), which fixed the compensation for the transportation of the mails on the extension of the route between Republic and Champion. The order of December 1, as well as that of December 3, provided for *future orders.* Furthermore, it is shown by paragraph 5 of the petition (Record, p. 6) that the Department claimed that the order of December 3 was a correction of the order of December 1. The order of December 3 was directed to the general superintendent of the Milwaukee and Northern Railroad Company at Milwaukee. It is not stated anywhere in the petition, and there is nothing in the record of this case to show that the Milwaukee and Northern Railroad Company or appellant in any way or manner objected to the change made by the order of December 3, or that they inter-

posed any objection or protest to carrying the mails under the rates as fixed by said order, but on the other hand, the Milwaukee and Northern Company continued to perform the services and carried the mails, without protest, without calling the attention of the Department to the change in the order of December 1 and without in any manner or in any way giving intimation that the company was not satisfied with the rates as fixed under the order of December 3. Inasmuch as it is clearly shown by the petition that the order of December 1, 1890, was a mistake and that the same was corrected by the order of December 3, 1890, two days thereafter, the original order, whatever it may have been, for carrying the mails between Milwaukee and Republic was left just as it had been before the issuance of the order of December 1 and the order of December 3 had the effect, further, of annulling the order of December 1, and of establishing the rate for the transportation of the mails over the extended portion of the route only, to wit, from Republic to Champion.

But the appellant contends that as the mails had been weighed for the entire route after the postal service had been extended on the new portion of said route, the weighing was for the purpose of fixing the rate of compensation for the entire route and not on the extension only; the allegation in the petition being as follows:

> * * * under the uniform practice and usage of the Post-Office Department for many

> years, whenever postal service is established on an extension of a line of railroad, and a weighing of the mail is had on the entire route for the purpose of ascertaining the rate of compensation, such compensation is fixed for the entire route and not on the extension only. (Record, p. 7.)

This contention is not tenable. In the case of the *Evansville and Indianapolis Railroad Company v. The United States* (32 C. Cls. R., 555) this question was carefully considered by the court and decided adversely to claimant's contention.

In that case the claimant owned and operated a line of railway between Evansville and Washington, Ind., a distance of 57.71 miles, which had been designated by the postal authorities as postal route No. 22026, and over which the claimant contracted to carry the United States mails at $42.75 per mile per annum from July 1, 1884, to June 30, 1887. The order provided, just as the order does in the case at bar, that the compensation was fixed "subject to future orders and to fines and deductions." Subsequently the route was extended to Worthington, a distance of 40.62 miles, over which the railway service was extended on July 20, 1886, to take effect on August 2, 1886, the rate of compensation to be thereafter adjusted. The mails were weighed over the route between Evansville and Worthington, as required by law, and in accordance therewith the rate of compensation was fixed over the extended portion of said route from Washington to Worthington at $56.43 per mile "subject to future orders and to fines and de-

ductions." The rate of compensation theretofore fixed for transporting the mails from Evansville to Washington remained unadjusted and unchanged, although the daily average rate of mail matter transported thereon was the same as that transported over the extended portion. The company was notified of the adjustment so made over the extended portion of the route and it continued thereafter to transport the mails, as in this case, without protest or objection. The claimant contended on presentation of its claim for carrying the mails over the entire route, that it was entitled to $56.43 per mile between Evansville and Washington, the same as between Washington and Worthington, or in other words, that the order fixing the compensation at $56.43 between Washington and Worthington had the effect, in view of the mails being weighed under authority of law over the entire route, of fixing the compensation over the entire route at said rate of $56.43. This is practically the contention of claimant in the case at bar, but in the case cited, the court held that the fixing of the rate over the extended portion in no way affected the rate over the old portion, and this notwithstanding that the mails over the entire route had been weighed for thirty successive days as required by law and as was done in the case at bar; that the extension of the railway and mail service over the extended portion of the route in no way interfered with the contract previously entered into between the Post-Office Department and the company for carrying the mails between Evansville

and Washington. And so in this case, whatever rates and contract existed for carrying the mails between Milwaukee, Wis., and Republic, Mich., over route No. 139016 were not affected by the order of December 3, 1890, fixing the rates for carrying the mails over the extended portion of the route between Republic and Champion. The only order, then, that could possibly affect the existing contract for carrying the mails between Milwaukee, Wis., and Republic, Mich., was the order of December 1, 1890, and this, as has been shown, was an error, and immediately corrected by the order of December 3. In this connection we cite the case of the *Eastern Railroad Company* v. *The United States* (129 U. S., 391), where the company entered into a contract with the Postmaster-General to carry the mails at a certain rate "unless otherwise ordered." The Government subsequently made a reduction of 5 per cent, but the company continued to carry the mails after such reduction, without protest and without objection. In the opinion Mr. Justice Harlan said:

> It can not be said that the reduction of 5 per cent was a violation of that contract, for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such orders as the Postmaster-General might make. We do not mean that the railroad company was bound to continue the carrying of the mails if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the 5 per cent reduction was made, to discontinue their transportation on its cars. (See case cited, p. 395.)

When the Milwaukee and Northern Railroad Company received notice of the order of December 3, 1890, it had notice of the adjustment of the compensation over the extension of the route, and that adjustment left the original contract in full force for carrying the mails between Milwaukee and Republic and related only to the compensation for the service between Republic and Champion. The company made no protest, in no way sought an explanation of the order of December 3, and it may be justly inferred that it viewed the order of December 3 in the same light and as having the same force and effect as intended by the postal authorities.

It must be remembered that there was no duty resting upon the Post-Office Department to readjust the compensation for carrying the mails between Milwaukee and Republic, which, nevertheless, it was imperative to fix the compensation for the service between Republic and Champion; and since the extension from Republic to Champion was not constituted a new route, and was therefore added, as was manifestly necessary, to the old route between Milwaukee and Republic (No. 139016), the compensation for carrying the mail on this extension could be determined under the regulations only by weighing the mail over the whole route as thus extended. This weighing was accordingly done by the Post-Office Department, but with the sole purpose, as expressly announced in the order for such weighing, of determining the compensation to be paid the Milwaukee and Northern Railroad

Company for carrying the mail over the extension of the old route from Republic to Champion.

Appellant sets forth in its petition a list of some twenty-five different routes that had been extended and on which the postal authorities ordered the weighing of the mails over the entire route after the extended portion had been put in operation and on which routes the Government after the weighing of said mails as required by law adjusted the compensation for carrying the mails over the entire route, including the extended portion. (Record, p. 7.) While it may be true that the postal authorities elected to adjust the compensation over the entire routes mentioned, including the extensions in the particular cases set forth in the petition, yet this fact in nowise affects the right of the Post-Office Department to adjust the compensation over the extended portion of the route only, leaving the contract over the old portion of the route as it was prior to the extension. This, as we have pointed out, it had a right to do in the case of the Evansville and Indianapolis Railroad Company. Furthermore it may have been that in the routes designated in appellant's petition the contracts for carrying the mails over the old portion of the routes was about to expire and the Government found it expedient to adjust the compensation over the entire routes, including the extensions. Whatever may have been the practice of the Department in this respect, it certainly was not bound to annul a contract that it had for carrying the mail over a route where that contract

was advantageous to the Government and had not terminated, simply because the railroad company made an extension of its road and the Department extended the mail service over such new portion.

For the reasons above given, it is insisted that on the merits the petition of claimant was rightfully dismissed.

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